INDEX

CITATIONS

333-088—69——1

Cases—Continued

Statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 672

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN P. KING

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 12–40) is reported at 182 Ct. Cl. 631, 390 F. 2d 894.

JURISDICTION

The decision of the Court of Claims was entered on February 16, 1968 (R. 12). The government's timely motion for reconsideration was denied on June 14, 1968 (R. 2). On September 5, and October 3, 1968, the Chief Justice extended the time for filing a petition for a writ of certiorari respectively to and including October 11, and October 21, 1968. The petition was filed on October 21, 1968, and was granted

on January 13, 1969 (R. 43). The jurisdiction of this Court rests upon 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Declaratory Judgment Act, 28 U.S.C. 2201, grants the Court of Claims jurisdiction to enter declaratory judgments against the United States.

STATUTES INVOLVED

The Tucker Act, 28 U.S.C. 1491, provides in pertinent part:

> § 1491. Claims against United States generally. * * *
>
> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> * * * * *

The Declaratory Judgment Act, 28 U.S.C. 2201, provides in pertinent part:

> § 2201. Creation of remedy.
>
> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
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> * * * * *

STATEMENT

Respondent, Colonel John P. King, was retired from the Army in 1959 for longevity. Subsequently, the Secretary of the Army, acting through the Physical Disability Appeal Board and the Board for Correction of Military Records, rejected respondent's contention that he should have been retired for disability. Although respondent is entitled to retirement pay of seventy-five percent of his basic pay as a colonel regardless of the basis for his retirement,[1] disability retirement would have entitled him to the exemption from income taxation that Section 104(a)(4) of the Internal Revenue Code of 1954 allows pensions based on a service-connected disability (R. 13).

Respondent brought this action in the Court of Claims, alleging that "[t]he action of the Secretary of the Army in failing to grant plaintiff physical disability retirement was arbitrary, capricious, not supported by the evidence and contrary to law and regulation" (R. 6). He sought a "judgment against defendant for physical disability retirement with retired pay equal to 75% of the pay of a Colonel * * * less such net retirement pay for years of service heretofore paid to plaintiff" (R. 6–7), *i.e.*, for an amount equal to "the federal taxes assessed on his retirement pay" (R. 13). He has never brought suit in a district court for the purpose of compelling the Secretary of the Army or other responsible official to reopen his case or to change his record to reflect a disability retirement.

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[1] *Compare* 10 U.S.C. 3911, 3991 *with* 10 U.S.C. 1201, 1401.

The Court of Claims accepted the government's contention that this was "basically a claim for a refund of taxes" and was, therefore, barred by respondent's failure to allege the filing of a timely claim for refund with the Internal Revenue Service (R. 7–8, 13).[2] See 26 U.S.C. 7422(a). Rather than dismissing the complaint, the court issued an order suggesting that "the only possible basis upon which the case can be maintained is under the Declaratory Judgment Act," and requested "briefs on the applicability of that Act to this court and this case" (R. 12).

After briefs were filed and the point argued, the Court of Claims held that it had the power to grant declaratory judgments against the United States. Rejecting government contentions that its jurisdiction is limited to the granting of money judgments and that the Declaratory Judgment Act does not apply to suits against the United States, the Court of Claims overruled a line of its own decisions beginning with *Twin Cities Properties, Inc.* v. *United States*, 81 Ct. Cl. 655, and held (R. 32):

> * * * claimants with this type of case traditionally within our purview—claims against the Federal Government with a money cast, money-oriented, related to the immediate or ultimate recovery of money (administratively or judicially) from the United States—can seek declaratory judgments from us (if the other proper requisites exist) although they are unable to request or obtain a money judgment. * * *

[2] Respondent in fact had not filed such a claim (R. 13).

The court therefore denied the motion to dismiss and granted respondent leave to amend his petition "to seek explicitly a declaration of his right to be retired for disability and to have his military records changed." The case was "then to be returned to the trial commissioner for further proceedings." (R. 40.)

SUMMARY OF ARGUMENT

The Court of Claims' jurisdiction to grant declaratory judgments or any other relief depends entirely on the extent to which the United States has waived its sovereign immunity to suit. Such a waiver must be plain and explicit; it cannot be inferred or implied. Two statutes—the Declaratory Judgment Act and the Tucker Act—provide the only possible sources of the waiver that would be necessary to support the decision below.

These statutes do not authorize declaratory judgments against the United States, either in the Court of Claims or in any other tribunal. In the Declaratory Judgment Act itself, Congress did not intend to broaden the subject matter jurisdiction of the federal courts, but only created an additional remedy in cases where a trial court already had such jurisdiction. In terms of the present case, this means that the essential point of reference is the part of the Tucker Act which confers jurisdiction on the Court of Claims.

This Court, in a long line of cases, has consistently ruled that the Court of Claims' jurisdiction extends only to controversies where the claimant asserts a present right to receive money from the United States. This is not such a case. Until the present case,

the Court of Claims had long agreed that neither the Declaratory Judgment Act nor the Tucker Act authorizes it to grant declaratory judgments. All the courts of appeals which have considered the issue agree that neither the part of the Tucker Act which grants the district courts concurrent jurisdiction with the Court of Claims over certain disputes nor the Declaratory Judgment Act allows a district court to enter a declaratory judgment against the United States. Indeed, to rule otherwise would be inconsistent with the rationale of *United States* v. *Sherwood,* 312 U.S. 584.

Moreover, permitting the Court of Claims to render a declaration of respondent's rights in the present procedural context would in several ways contravene the settled limits on its authority. For example, the court would in substance be granting equitable relief although Congress has always declined to grant it such power.

For these reasons, the decision below was erroneous and cannot stand. Like all other persons alleging that a federal official acted outside his authority or contrary to a statute or regulation, respondent should be limited to an action for equitable relief against that official in a district court.

ARGUMENT

It is axiomatic that the United States may not be sued "save as it consents to be sued * * * and the

terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States* v. *Sherwood,* 312 U.S. 584, 586. The consent to suit must be unequivocally and directly expressed. A waiver of sovereign immunity cannot be implied. See *id.,* 589–591; *Mine Safety Appliances Co.* v. *Forrestal,* 326 U.S. 371; *Lynch* v. *United States,* 292 U.S. 571, 581–582. Thus Congress has always cast waivers of sovereign immunity in explicit and unmistakable terms—as, for example, in the Tucker Act, 28 U.S.C. 1346(a), 1491; the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671–2680; and the Suits in Admiralty Act, 46 U.S.C. 742.

The Court of Claims' jurisdiction is limited to suits against the United States. Apart from the authority expressly conferred by statute, "there is no jurisdiction in the Court of Claims more than in any other court to entertain suits against the United States." *United States* v. *Sherwood, supra,* 312 U.S. at 587–588. In consequence, the resolution of this case requires analysis of the Declaratory Judgment Act and the Tucker Act, which are the only possible sources of the waiver of sovereign immunity that is necessary to sustain the instant decision of the Court of Claims. We shall discuss each of these statutes and show that neither separately nor in combination do they allow the Court of Claims to act in any case where the claimant is unable to put forward a claim for presently due money damages.

I. THE DECLARATORY JUDGMENT ACT DOES NOT WAIVE THE IMMUNITY OF THE FEDERAL SOVEREIGN BUT MERELY ALLOWS A TRIAL COURT TO DECLARE RIGHTS WHERE SOME OTHER STATUTE GRANTS JURISDICTION OF THE SUBJECT MATTER

The Declaratory Judgment Act does not contain the explicit waiver of sovereign immunity that is essential to provide a source of jurisdiction for the Court of Claims to declare respondent's rights with respect to the Secretary of the Army's refusal to amend his military records. On its face, that statute is only what Congress called it in adding a clause barring declaratory judgments in federal tax cases: "a procedure designed to facilitate the settlement of private controversies."[3]

Although the Act was adopted in 1934, 48 Stat. 955, to assist "in avoiding the necessity * * * of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages,"[4] the Act was not intended to enlarge the subject matter jurisdiction of the federal courts. "[T]he operation of the Declaratory Judgment Act is procedural only." *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240. In other words, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671. See, also, *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U.S. 249, 264; *United States* v. *West Vir-*

[3] S. Rep. No. 1240, 74th Cong., 1st Sess. 11.

[4] S. Rep. No. 1005, 73d Cong., 2d Sess. 2; see, also, H. Rep. No. 1264, 73d Cong., 2d Sess. 2.

ginia, 295 U.S. 463, 475; Borchard, *Declaratory Judgments* (2d ed.) p. 233; 6A Moore, *Federal Practice* ¶ 57.23, p. 3136. Nothing in the legislative history of the Declaratory Judgment Act negates this view. On the contrary, the Act was reworded in 1948 to provide expressly, as it still does, that a federal court may grant such a judgment only "[i]n a case of actual controversy *within its jurisdiction*" (emphasis supplied). 62 Stat. 964.[5]

In consequence, the Declaratory Judgment Act itself cannot be a fountainhead of subject matter jurisdiction for the federal courts. It makes available a new procedure, but that procedure is limited to cases that come within the jurisdictional limits established by other provisions of the Judicial Code.

II. THE JURISDICTION OF THE COURT OF CLAIMS IS LIMITED TO CLAIMS FOR THE PRESENT RECOVERY OF MONEY FROM THE UNITED STATES

The jurisdiction of the Court of Claims is now founded on the part of the Tucker Act codified in 28 U.S.C. 1491. It provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United

[5] Similarly, the Uniform Declaratory Judgment Act, now in force in a majority of States, is limited to actions in "courts of record within their respective jurisdictions." See 6A Moore, *supra*, ¶ 57.02[1], pp. 3004–3005.

States, or for liquidated or unliquidated damages in cases not sounding in tort.[6]

As the tribunal created "primarily to relieve the pressure on Congress caused by the volume of private bills," *Glidden Co.* v. *Zdanok,* 370 U.S. 530, 552, the court's jurisdiction has always been defined in terms of cases involving a "claim" against the federal government.[7] This Court has repeatedly held that this statutory formulation limits the jurisdiction of the Court of Claims to cases involving a demand for a money judgment. "From the beginning it has been given jurisdiction only to award damages * * *." *Glidden Co.* v. *Zdanok, supra,* 370 U.S. at 557. Thus the Court of Claims may not issue mandamus,[8] may not determine an equitable claim for money,[9] may not remand a case to an administrative agency,[10] may not direct specific performance,[11] and may not even grant nominal damages.[12] See, also, *United States* v. *Sherwood, supra,* 312 U.S. at 588.

This authority allows but one inference: that the Court of Claims must dismiss a case once it finds, as it

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[6] The Judicial Code also gives the Court of Claims jurisdiction of matters arising from "any unsettled account" of federal officers or contractors, 28 U.S.C. 1494, and in a variety of special situations not pertinent here, 28 U.S.C. 1495–1499.

[7] *E.g.*, Section 1 of the Act of February 24, 1855, 10 Stat. 612; Section 2 of the Act of March 3, 1863, 12 Stat. 765.

[8] *United States* v. *Alire*, 6 Wall. 573.

[9] *Bonner* v. *United States*, 9 Wall. 156.

[10] *United States* v. *Jones, Receiver*, 336 U.S. 641.

[11] *United States v. Jones*, 131 U.S. 1.

[12] *Grant* v. *United States*, 7 Wall 331, 338; *Marion & Rye Valley Railway Co.* v. *United States*, 270 U.S. 280; *Nortz* v. *United States*, 294 U.S. 317, 327; *Perry* v. *United States*, 294 U.S. 330, 355.

has here, that the claimant does not have a present right to receive money from the United States. To be sure, in adopting the Declaratory Judgment Act, the Congress drew an analogy to the Court of Claims' procedure, stating that "the decisions of the United States Court of Claims are essentially declaratory in nature, for they provide for no execution." S. Rep. No. 1005, 73d Cong., 2d Sess. 4–5. But such a "declaration" relates to a present right to payment from the United States, and in the absence of such a right, the Court of Claims has no power to declare that the claimant has other rights against the United States. As the Senate Committee said in the sentence immediately following the one just quoted, the Declaratory Judgment Act was intended to "simply extend declaratory relief to other cases, *provided the parties and subject matter are within the jurisdiction of the Federal courts.*" (Emphasis supplied.) Because the Court of Claims' jurisdiction ends if it determines that there is no present right to money, its power to declare rights ends at the same point.

In fact, until the decision below, the Court of Claims agreed with this analysis, in a number of cases that it has overruled here. Only one year after the passage of the Declaratory Judgment Act that court held that the Act in no way changed its powers (*Twin Cities Properties, Inc.* v. *United States*, 81 Ct. Cl. 655, 658):

> If Congress had intended to extend the scope of this court's jurisdiction and subject the United States to the declaratory judgment act, we think express language would have been used to do so, and the court is not warranted in assuming an intention to widen its jurisdic-

> tion from the general provisions of the act which concerns a proceeding equitable in nature and foreign to any jurisdiction this court has heretofore exercised.

Accord, 6A Moore, *supra*, ¶ 57.02[4], pp. 3010–3011. This view was adhered to as recently as 1966. *Rolls-Royce Ltd., Derby, England* v. *United States*, 176 Ct. Cl. 694, 701–702, 364 F. 2d 415, 419–420.

Added authority for this position is found in the cases holding that the district courts may not enter declaratory judgments against the United States. Because the Tucker Act grants the district courts concurrent jurisdiction with the Court of Claims (28 U.S.C. 1346(a)(2)) in "[a]ny * * * civil action or claim against the United States, not exceeding $10,000 in amount founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department * * *", it has been contended that the combined effect of the Tucker Act and the Declaratory Judgment Act is to allow the district courts to render declarations of rights against the United States.

Every court of appeals that has considered this contention—and a majority of the circuits has done so—has rejected it. Each has ruled that the district court's jurisdiction under the Tucker Act is limited to claims for actual, presently due money damages from the United States, and that Congress has not waived sovereign immunity to allow declaratory judgments in the absence of such a claim. *E.g.*, *Stout* v. *United States*, 229 F. 2d 918, 919 (C.A. 2), certiorari

denied, 351 U.S. 982; *Wilson* v. *Wilson*, 141 F. 2d 599, 600 (C.A. 4) (alternative holding); *Anderson* v. *United States*, 229 F. 2d 675, 677 (C.A. 5) (claim to condemned land); *United States* v. *Smith*, 393 F. 2d 318 (C.A. 5); *Love* v. *United States*, 108 F.2d 43, 50 (C.A. 8), certiorari denied, 309 U.S. 673; *Wells* v. *United States*, 280 F. 2d 275, 277 (C.A. 9); *Clay* v. *United States*, 210 F. 2d 686 (C.A.D.C.); see *Gibson* v. *United States*, 161 F. 2d 973, 794 (C.A. 6) (dictum); see generally 6A Moore, *supra*, ¶57.21[1], p. 3123.[13]

If anything, the case for declaratory relief against the United States is stronger in the district courts than in the Court of Claims. Each court's jurisdiction under the Tucker Act is identical.[14] But the district courts, unlike the Court of Claims,[15] have general equitable jurisdiction[16] and the Declaratory Judgment Act, generally speaking, applies to actions in the

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[13] The only contrary authority of which we are aware is *Raydist Navigation Corp.* v. *United States*, 144 F. Supp. 503 (E.D. Va.).

[14] *United States* v. *Sherwood*, *supra*, 312 U.S. at 590.

[15] See *Twin Cities Properties, Inc.* v. *United States*, *supra*, 81 Ct. Cl. at 658.

[16] This Court has characterized the declaratory judgment as equitable relief. *Eccles* v. *Peoples Bank*, 333 U.S. 426, 431. See, also, *Great Lakes Co.* v. *Huffman*, 319 U.S. 293, 300; H. Rep. No. 1264, 73d Cong., 2d Sess. 2. But see 6A Moore, *supra*, ¶57.04, p. 3019. Regardless of the label placed upon it, a suit seeking such relief obviously does not involve a claim for money damages based upon the Constitution, statutes or regulations of the United States, and so cannot be distinguished from the actions brought in the cases cited in the text (*supra*, pp. 12-13) in which the Declaratory Judgment Act was held inapplicable to Tucker Act suits.

district courts.[17] The lack of jurisdiction of the Court of Claims to grant declaratory relief thus follows *a fortiori* from the court of appeals cases.

Moreover, the decision below is inconsistent with the rationale of *United States* v. *Sherwood*, *supra*, 312 U.S. 584. There the New York Supreme Court had authorized a judgment creditor to satisfy its judgment against a private debtor by a suit under the Tucker Act based on the judgment debtor's claim against the United States for an alleged breach of a government contract. In essence, the New York court, following New York statutory authority, assigned to the creditor part of the debtor's action against the United States. The judgment creditor then filed suit in the district court against the United States. Of course, he did not himself have a claim against the United States—the jurisdictional requisite of the Tucker Act. The theory was that the then new Federal Rules of Civil Procedure allowed the creditor to enforce his debtor's rights against the United States because Rule 17(b) provides that "capacity to sue" was governed by the law of the plaintiff's domicile, in that case New York.[18] The Second Circuit, reversing the district court, held that the latter had jurisdiction of the action.

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[17] Three courts of appeals have suggested that the district courts may grant "incidental" equitable relief in Tucker Act cases. *Clay* v. *United States*, 210 F. 2d 686 (C.A.D.C.); *Lynn* v. *United States*, 110 F. 2d 586 (C.A. 5); *Blanc* v. *United States*, 244 F. 2d 708 (C.A. 2). (We are unaware of any case in which such relief has been granted.) The Second Circuit in *Blanc* ruled (*id.* at 709), nevertheless, that declaratory relief is not the sort of "incidental relief in equity in aid of a judgment" that is permitted in a Tucker Act action.

[18] Fed. R. Civ. P. 17(b) still contains this provision.

This Court, however, held that the district court properly had dismissed the suit. Applying an analysis substantially the same as that given in this brief, see 312 U.S. at 587–591, the Court, speaking through Mr. Justice Stone, unanimously ruled that the Tucker Act did not waive the United States' sovereign immunity against suits by the creditor of a person having a Tucker Act claim. Although the provisions of Federal Rule 17(b) relating to capacity, if literally read, would have sustained jurisdiction, this Court held that such a procedural rule was an inadequate foundation on which to base a waiver of sovereign immunity because (312 U.S. at 591):

> [t]he matter is not one of procedure but of jurisdiction whose limits are marked by the Government's consent to be sued. * * * The jurisdiction thus limited is unaffected by the Rules of Civil Procedure, which prescribe the methods by which the jurisdiction of the federal courts is to be exercised but do not enlarge the jurisdiction.

Similar reasoning governs this case. The Tucker Act does not waive the United States' immunity against actions for declaratory judgments. The Declaratory Judgment Act is procedural only, and does not expand the limited waiver of sovereign immunity in the Tucker Act.[19] The end result is that the immunity

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[19] Comparable proscriptions upon the operation of the Uniform Declaratory Judgment Act exist in the State courts. For example, it has long been recognized that State probate courts are not authorized to grant declaratory judgments. See Borchard, *supra*, pp. 247–248.

has not been waived and the Court of Claims should have dismissed this case.

III. THE DECISION BELOW IS INCONSISTENT WITH THE HISTORICAL FUNCTIONS OF AND LIMITATIONS UPON THE JURISDICTION OF THE COURT OF CLAIMS

As we have indicated above, the Court of Claim's jurisdiction has always been a sharply limited one. It may declare whether a claimant has the right to collect money from the United States. But it may do no more—it may not even execute such a decision. Equally important, the decisions of this Court cited above and the history of the Court of Claims Act demonstrate that these limitations reflect a conscious policy determination by the Congress. The decision here, however, would allow the Court of Claims to hear and declare rights in a variety of situations that have always been thought beyond its powers. If the court's jurisdiction is thus to be enlarged, we suggest that Congress is the appropriate agency to do so.

1. The first factor is that Congress has never seen fit to allow the Court of Claims to grant equitable relief. When the Court of Claims was first established, Senator Pettit urged Congress to allow "either a legal or an equitable claim against the Government," Cong. Globe, 33d Cong., 2d Sess., p. 72, December 18, 1854, but it refused to do so, and limited the court to the subject matter formerly handled by Congress in private bills (*i.e.*, money claims). See *id.*, 105–114. Later, in urging Congress to grant finality to Court of Claims' decisions, President Lincoln noted the great number of claims against the government which were beginning

to arise out of the Civil War, and stated that "it was intended by the organization of the Court of Claims to remove this branch of business from the Halls of Congress * * *." Message to Congress, December 3, 1861, Cong. Globe, 37th Cong., 2d Sess., App., p. 2. As recently as the last session of Congress, a bill was proposed—and recommended by a committee which seemed to approve of the decision below—to allow the Court of Claims the same equitable powers as the district courts now possess, but the bill failed when it died in the House.[20]

Thus the Court of Claims' *raison d'etre* has been to relieve Congress of the burden of passing on claims for money against the United States. The Court's function is to sift those claims to determine which are meritorious and the amount of money that should be paid, and it may do no more.

In practical effect, however, the Court of Claims has here asserted the power to grant relief that is equitable in nature. It authorized respondent to seek "a declaration of his right to be retired for disability and *to have his military records changed*" (R. 40; emphasis supplied.) If the Court of Claims has jurisdiction to grant such relief, that declaration presumably would have *res judicata* effect as between respondent and the United States. The effect ultimately could be the same as the entry of a mandatory injunction against the

[20] S. 1704 was introduced for this purpose in the 90th Congress. See S. Rep. No. 1465, 90th Cong., 2d Sess. The bill passed the Senate, but not the House. See 114 Cong. Rec. 39662, July 29, 1968. Compare 28 U.S.C. 2202, not involved here, which gives federal courts the power to enforce declaratory decrees.

United States, *i.e.*, compelling the correction of respondent's records to show that he was retired for disability rather than longevity. Even the district courts could not grant such relief against the United States as such, but could act only in a suit against the officials whose actions are alleged to be unlawful. Cf. *United States* v. *Lee*, 106 U.S. 196; *Land* v. *Dollar*, 330 U.S. 731.

But even if the effect of permitting such relief is not so viewed, the result would in substance constitute a remand to an administrative officer, a remedy that has long been considered unavailable in the Court of Claims. See *United States v. Jones, Receiver, supra*, 336 U.S. 641. And once such jurisdiction is established, there would be no real basis for distinguishing between allowing a plaintiff the statutory remedy of a declaration of rights and granting him such equitable remedies as specific performance (forbidden in *United States* v. *Jones, supra*, 131 U.S. 1) or damages for unjust enrichment (forbidden in *Bonner* v. *United States, supra*, 9 Wall. 156).

2. Other enlargements upon the Court of Claims' jurisdiction that result from its decision below may be illustrated by a variety of cases that are now pending in that tribunal.

One, *Paulsen* v. *United States*, Ct. Cl. No. 327-67, involves a claim that the plaintiff was improperly placed on involuntary sick leave by the government agency for which she worked. Even though the Court of Claims seemed to agree with the government's position that a claim for sick leave cannot be converted

into money damages, it has issued an order allowing the plaintiff to avoid dismissal by amending her complaint to seek a judgment declaring that the agency's action was unlawful.

A second case, *Wilkerson* v. *United States*, Ct. Cl. No. 137–65, was thought to have become moot when a discharged electrician's mate who had brought a backpay action died, having worked between his discharge and his death for a civilian employer at a wage greater than his military salary. The Court of Claims, however, affirmed an order of a Commissioner that denied the government's motion for summary judgment, and suggested that the plaintiff's widow, who had been substituted as plaintiff in her capacity as administratrix, might amend to seek a declaration of her rights to widow's benefits, a question not before in issue.

In three cases [21] involving claims that shipbuilding subsidies awarded by the Maritime Subsidy Board were too low, the plaintiffs have pleaded, in the alternative, for a judgment declaring that they are entitled to an evidentiary hearing before the administrative agency with discovery of certain government cost estimates.[22] (In view of the decision in the present case, the government has not moved to strike that claim.)

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[21] *American Export Isbrandtsen Lines, Inc.* v. *United States*, Ct. Cl. No. 75–68; *American President Lines, Ltd.* v. *United States*, Ct. Cl. No. 55–68; *Delta Steamship Lines, Inc.* v. *United States*, Ct. Cl. No. 74–68.

[22] A trade association of steamship companies interested in the subsidy program appeared below as *amicus* in support of respondent. (See R. 14.)

Paulsen and *Wilkerson* obviously present circumstances where the Court of Claims could not grant a money judgment, and, without the asserted power to issue declaratory relief, would have no jurisdiction. For example, the correct course in *Paulsen* would have been to institute an injunctive action in the district court. Wilkerson's widow, on the other hand, should have been required to apply to the Navy for those widow's benefits to which she thought herself entitled. And in the ship subsidy cases, if damages are denied, a judgment declaring that there should have been an evidentiary hearing would again in essence constitute a mandatory order from the Court of Claims to an administrative agency.

3. Another area of concern is, as this case well illustrates, federal tax litigation. Respondent's retirement pay would be the same regardless of the basis for his retirement (R. 13). As his original complaint indicated, the only benefit he can obtain from the decision below is an exemption from income taxation under Section 104(a) of the Internal Revenue Code of 1954. We question whether the correct basis for respondent's retirement may be properly litigated in a tax refund case, for we should suppose that the tax collector must act on the basis of respondent's military records unless and until those records are changed through the proper procedures, *i.e.*, a suit in the distict court against the proper officials of the Department of Defense. Cf. *Ashe* v. *McNamara*, 355 F. 2d 277 (C.A. 1). Of course the Court of Claims is wholly without jurisdiction of such a case.

But assuming *arguendo* that such a point might be

raised in a tax suit—and that is the only manner in which this case could have the "money cast" the Court of Claims perceived here (R. 32)—maintenance of this litigation would violate an express bar written into the Declaratory Judgment Act. In 1935, Congress amended that Act to except from its coverage cases "with respect to Federal taxes," [23] language that is still in the statute.

The Court of Claims asserted (R. 39–40), however, that this is not a tax case because it does not involve "the interpretation and application of" the Internal Revenue Code. If this is so here, then there will be a large number of similar controversies where the courts might grant declaratory judgments even though the only reason for and effect of the controversy would be in federal tax liabilities, and the taxpayer has not followed the procedures established in the Internal Revenue Code. One such case, for example, would have been *Wilson* v. *Wilson, supra*, where the parties sought a judgment declaring partnership rights under State law, from which federal tax consequences would result. Thus, respondent's attempt to obtain tax relief notwithstanding his failure to file a timely claim for refund, see 26 U.S.C. 7422(a), is precisely what Congress intended to prevent in the 1935 amendment to the Declaratory Judgment Act. See S. Rep. No. 1240, 74th Cong., 1st Sess. 11; 6A Moore, *supra*, ¶ 57.16, p. 3089; cf. *Schilling* v. *Rogers*, 363 U.S. 666, 677; *Eccles* v. *Peoples Bank*, 333 U.S. 426, 434; *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 543.

[23] See Section 405 of the Revenue Act of 1935, 49 Stat. 1027.

IV. THE DECISION BELOW IS INCONSISTENT WITH THE PURPOSES OF THE DECLARATORY JUDGMENT ACT

As we indicated above, the Declaratory Judgment Act was intended to create "a procedure designed to facilitate the settlement of private controversies".[24] Moreover, it was designed to allow judicial relief in private cases where traditional concepts forbade immediate suit for an injunction or damages. As the Congressional committee put it, it was intended to assist "in avoiding the necessity * * * of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages."[25]

Here, of course, the controversy is public rather than private. Equally important, a declaratory judgment is not required for the preservation, protection, or enforcement of respondent's rights. His basic contention is that the Secretary of the Army has acted (R. 6) "contrary to law and regulation." See *United States* v. *Lee,* 106 U.S. 196; *Land* v. *Dollar,* 330 U.S. 731, 736–738. The clear import of the respondent's allegations places him in the same position as any other plaintiff whose basic complaint is that the unlawful actions of a government official should be judicially remedied, and he should therefore have brought an action in a district court for declaratory, mandatory or injunctive relief against that official.

Thus, this case does not involve any of the traditional situations where a declaration of rights is per-

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[24] S. Rep. No. 1240, 74th Cong., 1st Sess. 11.

[25] S. Rep. No. 1005, 73d Cong., 2d Sess. 2; see also, H. Rep. No. 1264, 73d Cong., 2d Sess. 2.

mitted because it is preferable to forcing a party to act at his peril or abandon his rights. There is, for example, no written instrument involved which needs interpretation, no title to property in question, no patent being infringed, no security being dissipated. See generally Borchard, *Declaratory Judgments* (2d ed.). Respondent is simply attempting to litigate an ordinary claim of improper action by a federal official in a tribunal which Congress has not authorized to hear such actions and which therefore should have dismissed respondent's suit.

CONCLUSION

The judgment of the Court of Claims should be reversed with directions to dismiss this case.

Respectfully submitted.

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